MAY 5 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

1972 TERM

No. 71-1449

BRUCE GOLDEN, GUY W. LEWIS, VIRGIL GASKILL, DON LEWIS, STEWART PIGGOTT, THOMAS PIGGOTT, LUTHER P. LEWIS, WILLIAM D. MATTHEWS, ELMER JEFFERSON, STANLEY SHEDAROWICH, CURTIS BECKWITH, WILLIAM GRIFFIN, THOMAS ELLIOTT, CARL CARLSON, GUY RAWLS, WILTON WILLIS, PAUL KEANE, SCOTTY LYNCH, GEORGE GOLDEN, E. T. LAWRENCE, BEN O'NEILL, LINWOOD DALE, RICHARD D. PETERS, STACEY W. BROWN and WALTON DAY,

Petitioners,

versus

Oil Screw FRANK T. SHEARMAN, (formerly JOHN T. LILLIS, formerly LINCOLN PARK NO. 1, formerly TIMOTHY J. O'BYRNE), her engines, and tackle, etc., *in rem,*

and

TIDEWATER TOWING COMPANY, INC., *in personam,*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

OPINIONS BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

1. The Decision Below Conflicts with Decisions of This Court That Prohibit Selling Property at a Judicial Sale for a Grossly Inadequate Price, and That Require a Showing of Prejudice to the Party Asserting a Defense of Delay 5

2. The Decision Below Conflicts with Decisions of the Fourth and Other Circuits Concerning the Adequacy of Prices at Judicial Sales, and the Decision Conflicts with another Circuit as to the Application of Rules Limiting the Time Allowed to File Exceptions 10

3. The Decision Below Contravenes the Policy Established by This Court and Congress Protecting the Wages Earned by Seamen 16

CONCLUSION 18

APPENDIX 1a

Citations

American Transp. Shipment Dev. Corp. v. Coal Export Corp., 276 F. 2d 570 (4th Cir. 1960) 12

The Appam, 240 F. 676 (4th Cir. 1917) 10

Ballentyne v. Smith, 205 U.S. 285 (1907) 5, 6

Brandon v. Denton, 302 F. 2d 404 (5th Cir. 1962) 17, 18

Gardner v. Panama R.R., 342 U.S. 29 (1951) 8

Gelfert v. National City Bank of New York, 313 U.S. 221 (1941) 7, 8

Ghezzi v. Foss Launch & Tug Co., 321 F. 2d 421 (9th Cir. 1963) 13

John G. Stevens, 170 U.S. 113 (1898) 16, 17

Mariner's Services, Inc. v. Dunn's Marine Ry., Inc., 181 F. 2d 596 (4th Cir. 1950) 15

Schrevone-Bonomo Corp. v. Buff Barge Tow Corp., 134 F. 2d 1022 (2d. Cir. 1943), *cert. den.* 320 U.S. 749 (1943) 13, 15

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Bruce Golden, *et al.,* respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 10, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals, for the Fourth Circuit, not yet reported, appears in the Appendix attached hereto. No printed opinion was rendered by the District of Virginia.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 10, 1972. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.* §1254(1).

QUESTION PRESENTED

Whether the Oil Screw (Frank T. Sherman) should be resold because of the inadequate price at which it was sold (1/25 of the most conservative estimate of its worth).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 46

§ 953, Preferred maritime lien, priorities, other liens

(a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and endorsement of a preferred mortgage in accordance with the provisions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any

suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of section 952 of this title, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court . . .

United States Code, 28 *U.S.C.*

Fed. R. Civ. P., Rule 6 (b) (2)

(b) *Enlargement* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, . . .

(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; . . .

STATEMENT OF CASE

On April 26, 1971, C.I.T. Corporation, as the holder in due course of a promissory note made by Tidewater Towing Company, Inc., payable to Western Branch Diesel, Inc., and as the assignee of the first preferred ship's mortgage on a tugboat, the FRANK T. SHEARMAN, filed suit to enforce the mortgage against the SHEARMAN *in rem* and Tidewater Towing Company *in personam*. While the note was made out in the amount of $149,875 at the time the suit was filed only $109,908.28 was due.

A United States Marshal attached the SHEARMAN on April 27, 1971, and the plaintiff below followed the statutory steps to effect the sale of the vessel. After the order of attachment, the petitioners filed motions to intervene as parties plaintiff, since they had wage claims against the SHEARMAN totaling $7,087.68. The petitioners all were crew members aboard the SHEARMAN.

On June 1, 1971, a decree was entered directing the Marshal to sell the SHEARMAN at a public auction on June 8, 1971. The decree specified the conditions of the sale and directed that notice of the sale be published in a Norfolk newspaper for five days.

At the auction, only one bid was offered: that of Western Branch for $1,000. The Marshal accepted the bid, and sold the vessel to Western Branch. The petitioners filed a motion to set aside the sale on June 17, 1971, a mere nine days after the auction took place. The District Court Judge heard arguments on the motion the same day. During the hearing, Western Branch asserted that the vessel was worth a maximum of $50,000 and for the purposes of the hearing, the judge assumed its value to be at least $25,000. Nonetheless, the District Court denied the claimants' motion, citing Local Admiralty Rule 5, which states:

> Rule 5—Sales by the Marshal and Confirmation Thereof
>
> (a) All sales shall be made by the Marshal of this Court, subject to confirmation by the Court, and after notice consisting, unless otherwise ordered, at least of posting a notice on said bulletin board and publication thereof once in the newspaper hereinbefore designated, giving the time, terms, and place of sale, and no sale shall be made before the sixth

day after the last posting and publication of said notice.

(b) The marshal shall file with the clerk on the day of the sale his report thereof, and it shall lie for the two days immediately thereafter for exceptions. If no exceptions are filed within the said two days, the clerk shall at once submit the report and exceptions to the court. The marshal may decline to knock down a vessel or other property to the highest bidder when the highest bid, in his opinion, is grossly inadequate.

An order denying the petitioners' motion was filed on June 21, 1971, and they then appealed the sale of the vessel, to the Court of Appeals for the Fourth Circuit. Following the argument on December 9, 1971, the CIRCUIT COURT OF APPEALS affirmed the proceedings below on February 10, 1972, Judge Craven dissenting.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE COURT THAT PROHIBIT SELLING PROPERTY AT A JUDICIAL SALE FOR A GROSSLY INADEQUATE PRICE, AND THAT REQUIRE A SHOWING OF PREJUDICE TO THE PARTY ASSERTING THE DEFENSE AND DELAY.

In *Ballentyne v. Smith*, 205 U.S. 285 (1907), this Court considered the refusal of a lower court judge to confirm the judicial sale of land in a foreclosure action. William O. Smith sued the Pacific Heights Electric Railway Company Limited to foreclose a trust deed of $50,000, purporting to convey a two and one-half mile stretch of electric railway, including all its equipment, as well as

other property. The sale was made for $1,100. When exceptions were heard to the sale, the lower court refused to confirm the sale on the grounds that the property was worth at least seven times the value at which it was sold.

Following affirmation of the decision by the State Supreme Court, this Court granted certiorari to consider whether the price was so inadequate as to call for a refusal to confirm. It noted that there was no evidence of any irregularity in the proceedings of any kind. In considering the bases for setting aside a judicial sale, it said:

> A court of equity owes a duty to the creations seeking its assistance in subjecting property to the payment of debts, to see that the property brings something like its true value in order that, to the extent of that value, the debts secured upon the property may be paid; that it owes them something more than to merely take care that the forms of law are complied with, and that the purchaser is guilty of no fradulent act . . .

205 U.S. at 289. This Court also considered the concern courts should have for bidders at judicial sales who are guilty of no fraudulent conduct. But nonetheless, the refusal to confirm was upheld, not so much because the courts below had opposed the sale, but because of the clear evidence that the property was worth more than seven times the amount of the bid.

Using the facts of *Ballentyne* as a standard, the sale of the FRANK T. SHEARMAN was at a grossly inadequate price, since it went for 1/25 of the *lowest* valuation placed on it. The DISTRICT COURT judge's valuation, he admitted, was a minimal one. Evidence suggested that the vessel could be worth as much as $50,000 or fifty times the amount it went for at the Marshal's

sale. The sale is a clear example of disregard for the mandate established by this Court in *Ballentyne* that property at judicial sales be sold at reasonable prices.

In *Gelfert v. National City Bank of New York*, 313 U.S. 221 (1941), this Court considered, *inter alia*, the adequacy of the amount for which a piece of real estate was sold at a judicial sale. The National City Bank brought an action to foreclose a mortgage on the real estate, a default having occurred while $18,401.25 was yet due on the note. At the court-ordered sale, the property went for $4,000 leaving a balance due in excess of $16,000. The petitioner excepted to the sale, asserting that the selling price was "wholly inequitable and unconscionable," and asked the court below to fix a reasonable price for the land. The New York Court of Appeals said it made no difference that the statute was amended to allow a court to set the price, since amendment occurred after the contract was entered into.

This Court, however, disagreed, and briefly discussed the "long history" of judicial control of sales of realty to prevent "sacrificial prices." It stated further that:

> [I]t is quite uniformly the rule of this country, as in England, that while equity will not set aside a sale for mere inadequacy of price, it will do so if the inadequacy is so great as to shock the conscience or if there are additional circumstances against its fairness, such as chilled bidding. (Footnotes and citations omitted).

313 U.S. at 232. The Court, employing this policy, reversed the COURT OF APPEALS and allowed the New York Supreme Court to consider giving the property a price different from that determined at trial.

While the Court in *Gelfert* did not speak directly to the adequacy of the price of the land, the figures in *Gelfert* demonstrate what kind of price the Court might challenge, since, in effect, it did challenge it in this case. To repeat, the land in *Gelfert* was sold for $4,000 at the judicial sale. The Court noted that the petitioner claimed the fair market value of the land was $11,000, while the respondent suggested $6,500. The assessment for tax purposes was $15,000. Even assuming the respondent's figure was the most accurate there is still little difference between the sale price and $6,500: the latter is less than twice the former. But in the instant case, the most conservative valuation of the FRANK T. SHEARMAN, $25,000, is *twenty-five times* the amount the vessel was sold for at the marshal's sale. In light of the facts in *Gelfert* the sale price in the present case is grossly inadequate.

Both courts below denied the seamen relief since they filed exceptions to the Marshal's sale nine days after the sale, instead of two days as required by Local Admiralty Rule 5(b). There was no demonstration that the respondents were adversely affected by the delay of a mere seven days. In *Gardner v. Panama R.R.*, 342 U.S. 29 (1951), this Court considered the application of laches by a federal district court. The petitioner there filed a suit in admiralty to recover damages for injuries sustained while she was a passenger on respondent's ship. The suit was her third attempt to recover, and was not within the one year statute of limitations. The first two actions, timely filed, were dismissed because she had not sued under the proper statute, and when she did file properly in the second suit, the statute had been amended so as to not include her action.

Because the third suit was not filed within the one-year limitation, the respondent successfully pleaded the

defense of laches. The Supreme Court rejected the lower court's rigid application of the statute of limitations in deciding whether laches barred the action:

> Though the question of laches is a question primarily addressed the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief (cites omitted).

342 U.S. at 30-31. The Court then reversed the decision below since the petitioner had made substantial efforts to bring her action, and the respondent had not demonstrated that it had been prejudiced by the delay.

Thus the Court established the policy of considering the equities of the parties when applying a defense based upon a failure to act within a prescribed time. That policy should apply to the present case. The two-day limit found in Rule 5 (b) is so short that it hardly allows time for a party to object to the Marshal's sale. The seamen here objected to the sale a very short time after it was concluded (nine days). Further, there was no showing by the defendants below that the delay of seven days, of which two were non business days, prejudiced them in the least.

2. THE DECISION BELOW CONFLICTS WITH DECISIONS BY THE FOURTH AND OTHER CIRCUIT COURTS CONCERNING THE INADEQUACY OF PRICES AT JUDICIAL SALES, AND THE DECISION CONFLICTS WITH A DECISION OF ANOTHER CIRCUIT AS TO THE APPLICATION OF RULES LIMITING THE TIME TO FILE EXCEPTIONS.

In *The Appam*, 240 F. 676 (4th Cir. 1917), the court below considered the adequacy of the sale of cocoa, cocoa beans, and palm that were aboard THE APPAM. THE APPAM belonged to a British Corporation and while on a journey from West Africa to England, was captured by a German Cruiser, but finally made its way to Newport News, Virginia. Libels were filed against the ship and its owners, and due to the fact that the cargo was perishable, the District Court for the Eastern District of Virginia ordered that the cargo be sold.

The cocoa beans were sold to one Louis Lustig at 13-1/4¢ per pound. He failed to pay the full amount due, and thus, the cocoa beans were resold to Middleton & Co. for six cents per pound. The second sale was set aside at the instigation of the master of THE APPAM, and the cocoa beans were sold finally to Snyder and Wheeler for 9-1/2¢ per pound. The difference in total cost between the latter two sales was a mere $963.20. Middleton & Co. then tried to have the second sale reinstated. The Fourth Circuit rejected Middleton & Co.'s exception to the third sale, upholding the District Court's finding that the price at which the cocoa beans were sold at the second sale was inadequate. It quoted, at length, portions of the DISTRICT COURT's decision:

> The nature of the property is a very important element in deciding what is such gross inadequacy

of price as to indicate an unconscionable profit at the expense of those whose rights are under the protection of the court. When the property sold is land, or vessels, or other things having no definite or quotable market value, and evidence of inadequacy consists of opinions of witnesses, or even of an offer to pay a greater price, made upon information derived from the sale, or after the sale, great caution should be exercised in denying to the purchaser the benefit of a bargain which he took the risk of making. On the other hand, commodities sold and quoted daily on the market have a value which can be definitely ascertained, and as to them inadequacy of price so gross as to shock the conscience is a much more definite conception. No one would doubt that the purchase of corn, or cotton, or wheat, or United States bonds at half, or even three-fourths of the market value would be unfair and confer on the purchaser an unconscionable advantage.

Cocia beans are not so commonly known as wheat, corn, and cotton but they are a staple article of commerce, with a definite, quoted market value upon which they are bought and sold. It is reasonable to infer that the price of 13-1/2 cents a pound bid at the first sale with a deposit of $300 to secure the bid, was not materially above the market value at that time. With no evidence of decline in market value, the bid at the second sale was 6 cents a pound, less than half. This is strong evidence of a price so grossly inadequate as to give not simply a fair margin to the purchaser, but a great advantage at the expense of the owners, with practically no risk to himself. This evidence is fortified by the tender to the court, by the master, or a dealer who makes certain his offer to bid at least 9 cents a pound on a resale, by deposit-

ing a certified check for $1,000. It was said at the argument that the beans had been injured in storage, and that the market price did not exceed 10 cents a pound, but no proof was offered on these points.

The point is not free from difficulty, but the court cannot resist the conclusion that to confirm the sale would be to give the purchaser an unconscionable advantage of the parties for whose benefit the sale was made. The exception to the sale is therefore sustained.

There the DISTRICT COURT found inadequate a price that was slightly less than one-half the original price of 13-1/4¢ per pound. This finding is a stark contrast to the facts in the instant case, where the sale price is a much smaller percentage of the most conservative estimate of the FRANK T. SHEARMAN's value.

In *American Tramp Shipping and Development Corp. v. Coal Export Corp.*, 276 F. 2d 570 (4th Cir. 1960), the Fourth Circuit upheld the District Court's confirmation of an upset bid following the sale of a ship to satisfy a default judgment against it. At the sale, the appellant bid $75,000. Coal Export Corporation, which was not present at the sale, filed a timely exception to the sale, finally offering $115,000 for the vessel (a figure the DISTRICT COURT states would justify a resale). The Fourth Circuit supported the lower court's decision and ordered the resale of the ship at $115,000, as it served to "avoid a possible injustice."

The estimated value of the ship did not appear in the Circuit Court's decision, but the acceptance of the second bid leaves no doubt that the difference between the ship's value and the first bid was not even close to the discrepancy in bid and value found in the case of the FRANK T.

SHEARMAN. In *American Tramp Shipping*, only a small increase in bids was necessary to make the DISTRICT COURT order another sale; therefore, it is clear that the original bid was not even one-half of what the court thought the ship was worth.

In *Ghezzi v. Foss Launch And Tug Co.*, 321 F. 2d 421 (9th Cir. 1963), the Ninth Circuit Court of Appeals vacated the decision of a DISTRICT COURT confirming the sale of a tugboat. The vessel RICHARD was appraised at $85,000, yet sold at a Marshal's sale for $41,000. Following confirmation of the sale, one of the vessel's creditors, the First National Bank of Fairbanks, Alaska, asked the court to reconsider the confirmation and offered an upset bid of $70,000. The request was denied on the grounds that the Bank had ample opportunity before confirmation to offer its higher bid. However, on appeal, the Ninth Circuit refused to allow the confirmation to stand without a re-consideration by the DISTRICT COURT, even though there was no evidence of any wrongdoing at the sale. The $41,000 was simply too low in light of the assessed value of the tug and the subsequent upset bid.

Ghezzi provides a dramatic example of a sale price so "grossly inadequate" that its confirmation was vacated by a CIRCUIT COURT OF APPEALS. That decision conflicts directly with the one rendered by the Fourth Circuit below. In *Ghezzi*, the sale price was slightly less than one-half the assessed value of the RICHARD. The FRANK T. SHEARMAN is worth *at least* twenty-five times the amount for which it was sold.

Circuit COURTS OF APPEAL differ as to whether a late filing of exceptions or assignments of error can be remedied by the court involved. In *Schiavone-Bonomo Corp. v. Buffalo Barge Towing Corp.*, 134 F. 2d 1022 (2d Cir.

1943), *cert. denied*, 320 U.S. 749 (1943), the Court construed Rule 38 (3) which stated if an appellee desired relief beyond that stated in the decree, he must file an assignment of errors within ten days of the notice of appeal. It continued by saying, in full, that:

> The Bouchard Company did not file such an assignment of errors and is in default. However, that is only a default in time, against which it is always possible for a court to relieve when justice demands. Rule 40 of this court also provides that "on sufficient cause shown" it may allow an appellee to "interpose a new defense.": applications for that relief must be made within fifteen days after the filing of the record. The Bouchard Company failed to "interpose" the defense of the statute of limitations in this court; but again, that was a default only in time. Although the Rules of Civil Procedure have not yet been extended to the admiralty, the policy laid down in Rule 6 (b), 28 U.S.C.A. following section 723c, is in accordance with the earlier practice of the courts of equity, and the rule of admiralty is no different. Justice clearly demands that the Bouchard Company, which was at best only secondarily liable, should not be compelled to pay a judgment from which the Buffalo Company has been excused. The decree of this court will therefore dismiss the libel as against both respondents.

In other words, the Bouchard Company failed to meet the time limitations found in two of the court's rules, but the court refused to apply the ten and fifteen day rules rigidly. Rather, it followed the liberal policy found in Rule 6 (b) (2) of the Rules of Civil Procedure, 28 *U.S.C.A.*, which states:

Rule 6. Time.

* * *

(b) *Enlargement* When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done or within a specified time, the court for cause shown may at any time in its discretion . . .

(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect . . .

The Circuit Court of Appeals for the Fourth Circuit has taken the opposite position. In the decision rendered below concerning the FRANK T. SHEARMAN, it applied the two day rule strictly, thereby precluding relief to any party who did not react immediately after the judicial sale and file an exception to it. The Fourth Circuit apparently first laid down its rigid construction of time limitations, in admiralty cases at any rate, when construing the old 28 *U.S.C.A.* Admiralty Rule 39, which allowed sixty days to file motions to set aside judicial sales of vessels. In *Mariner's Services Inc. v. Dunn's Marine Ry., Inc.,* 181 F. 2d 596 (4th Cir. 1950), *per curiam,* a vessel was sold at the instance of a district court on January 24, 1949. The appellant did not move to have the sale set aside until April 12, 1949, over sixty days after the sale took place. The appellant's delay was fatal, as the court held that failure to comply with Rule 39 precluded any relief. While strict adherence to time restrictions of this sort may be reasonable where the period is sixty days, the application of this policy to a two day rule is unreasonable. Therefore, not only should this Court remedy the discrepancy in policies between these circuits, but it should support the flexible position found in *Schiavone-Bonomo Corp. v. Buffalo Barge Towing Corp., supra.*

3. THE DECISION BELOW CONTRAVENES THE POLICY ESTABLISHED BY THIS COURT AND CONGRESS AS WELL, PROTECTING THE WAGES EARNED BY SEAMEN.

In The *John G. Stevens*, 170 U.S. 113 (1898), this Court ruled on the priorities of several liens on the JOHN G. STEVENS, following a collision caused by the tugboat. Of the two liens involved, the earlier was to secure the cost of coal purchased by the tug owners in its home port and was executed pursuant to a New York statute. The second lien arose after a judgment was obtained against the tug for negligently colliding with a barge in tow. The district court had ruled that since the statutory lien was executed before the judgment lien, the former was entitled to priority. The Supreme Court reversed, holding that the latter lien, founded on a tort claim, had priority over the earlier lien for supplies based on contract. In holding as it did, the Court discussed generally several maritime liens. Of the lien for seamen's wages, it said:

> According to the favorite saying of Lord Stowell and Mr. Justice Story [liens for seamen's wages] are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages [citations omitted].

170 U.S. at 119.

Congress later enacted this strong policy protecting seamen's wages in 46 *U.S.C.* § 953 (1920) which states:

> (a) When used hereinafter in this chapter, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and indorsement of a preferred mortgage in accordance with the pro-

visions of this chapter; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all preexisting claims in the vessel, including any possessory common law lien of which a lienor is deprived under the provisions of section 962 of this title, shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court.

In *Brandon v. S.S. Denton*, 302 F. 2d 404 (5th Cir. 1962), the court, in applying the Ship Mortgage Act to several seamen's claims echoed words found in the *JOHN G. STEVENS*, when it said:

> Wages of seamen occupy a unique status. The statutory provision extending them the protection of a preferred maritime lien is deeply rooted in history. Seamen's wages, "according to the favorite saying of Lord Stowell and of Mr. Justice Story, are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages." The John G. Stevens, 1898, 170 U.S. 113, 119 18 S. Ct. 544, 42 L.Ed. 969. The statutes throw around seamen's wages

most definite, detailed, and stringent protections from faraway owners of vessels, from shipmasters, and from the seaman himself.

In *Brandon*, the court did not allow the seaman to prevail since their claims were for payments to welfare, vacation, and pension plans, and were not covered by the Act.

CONCLUSION

The decisions below have allowed, first, the sale of the FRANK T. SHEARMAN at a grossly inadequate price, and second, the rigid application of a rule with an apparent disregard to the equities of the parties. Those decisions have flaunted and thwarted the efforts of this Court and Congress to protect the "sacred liens" that seamen have against a vessel to protect their wages. Further, this Court should remedy the conflict among the CIRCUITS as to the effect of an inadequate sales price on the validity of a judicial sale, and as to whether the rules restricting the time allowed to file exceptions to judicial sales should be applied rigidly or leniently.

For these reasons, a Writ of Certiorari should be issued to review the judgment and decision of the Fourth Circuit.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1739

Bruce Golden, Guy W. Lewis, Virgill Gaskill, Don Lewis, Stewart Piggott, Thomas Piggott, Luther P. Lewis, William D. Matthews, Elmer Jefferson, Stanley Shedarowich, Curtis Beckwith, William Griffin, Thomas Elliott, Carl Carlton, Guy Rawys, Wilton Willis, Paul Keane, Scotty Lynch, George Golden, E. T. Lawrence, Ben O'Neill, Linwood Dale, Richard D. Peters, Stacey W. Brown and Walton Day,

Appellants,

versus

Oil Screw Frank T. Shearman, (formerly John T. Lillis, formerly Lincoln Park No. 1, formerly Timothy J. O'Byrne), her engines, tackle etc., *in rem,*

and

Tidewater Towing Company, Inc., *in personam,*

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

(Argued December 9, 1971. Decided February 10, 1972.)

Before WINTER, CRAVEN and FIELD, Circuit Judges.

Stuart V. Carter (Breit, Rutter, Montagna, and Carter on brief) for Appellants, and George W. Birkhead (Vandeventer, Black, Meredith and Martin on brief) for Appellees.

PER CURIAM:

On this appeal the appellant wage claimants challenge the action of the District Court in denying their motion to set aside the sale of the Tug Frank T. Sherman which sale had been made pursuant to an order of the Court incident to a proceeding for enforcement of a preferred ship mortgage under 46 U.S.C.A. § 951. The District Judge based his action primarily upon the failure of appellants to file exceptions to the sale within two days thereafter as required by Local Admiralty Rule 5 (b) of the Eastern District of Virginia.[1] Appellants contend

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[1] Local Admiralty Rule 5 of the United States District Court for the Eastern District of Virginia reads in its entirety as follows:

RULE 5—SALES BY THE MARSHAL AND CONFIRMATION THEREOF

(a) All sales shall be made by the marshal of this Court, subject to confirmation by the Court, and after notice consisting, unless otherwise ordered, at least

that the gross inadequacy of the sale price denied them the benefit of their preferred maritime wage liens under 49 U.S.C.A. § 953, and accordingly the court below should have relaxed the rigid application of Rule 5(b). Under the circumstances of this case we conclude that the District Judge did not abuse his discretion in denying the motion.

On April 26, 1971, C.I.T. Corporation, as holder of a note made by Tidewater Towing Company, Inc. payable to Western Branch Diesel, Inc. and as assignee of a first preferred ship's mortgage on the Shearman, filed suit to enforce the mortgage against the Shearman *in rem* and Tidewater *in personam*. At the time the suit was instituted the amount due from Tidewater on the secured note was $109,908.28.

The Shearman was attached by the U. S. Marshal on April 27, 1971, and thereafter the plaintiff followed the statutory steps to effect the sale of the vessel. Subsequent

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(Footnote No. 1 continued)

of posting a notice on said bulletin board and publication thereof once in the newspaper hereinbefore designated, giving the time, terms and place of sale, and no sale shall be made before the sixth day after the last posting and publication of said notice.

(b) The marshal shall file with the clerk on the day of sale his report thereof, and it shall lie for the two days immediately thereafter for exceptions. If no exceptions are filed, the sale shall stand confirmed as of course. If exceptions are filed within the said two days, the clerk shall at once submit the report and exceptions to the court. The marshal may decline to knock down a vessel or other property to the highest bidder when the highest bidder, in his opinion, is grossly inadequate.

to the order of attachment the appellant wage claimants filed motions to intervene as parties plaintiff, the aggregate of their claims being approximately $6,000.00. On June 1, 1971, a decree was entered directing the Marshal to sell the Shearman at public auction on June 8, 1971. The decree specified the conditions of the sale and, among other things, directed that notice thereof be published in the Norfolk Virginian Pilot for a period of five days. The decree of sale as entered was endorsed not only by counsel for C.I.T. Corporation, but also by counsel for the intervening wage claimants.

On June 8, 1971, the Shearman was offered for sale pursuant to the decree and although there were several persons in attendance the only bid offered was by Western Branch in the amount of $1,000.00. No other bids having been made, the Marshal accepted the bid of Western Branch and on the same date filed a report of sale with the Clerk of the District Court. So far as the record discloses, none of the wage claimants or their counsel attended the sale or took any steps to protect their interests until June 17, 1971, when the motion to set aside the sale was filed.

Concededly, the Shearman had a value far in excess of the $1,000.00 sale price. However, under the circumstances of this case, this facial inadequacy of price is not necessarily determinative. As heretofore stated, the amount due from Tidewater on the secured note was approximately $110,000.00. At the time of the sale Tidewater was hopelessly insolvent and Western Branch, as endorser of the note, was faced with liability to C.I.T. Corporation for the full balance. Under these circumstances, Western Branch was in a position to bid any amount up to the outstanding balance of the secured note and merely credit the bid price against the note. The

only parties who were in a position to force Western Branch to make more than a minimal bid at the sale were the appellant wage claimants who were entitled to priority in the proceeds of the sale ahead of the ship mortgage. However, as heretofore stated, either through negligence or some other reason the intervenors failed to attend the sale or offer a protective bid in the amount of the aggregate of their wage claims. Neither the appellants nor their counsel are in a position to complain of lack of notice since the decree of sale was endorsed by their counsel and the sale itself was advertised for a period of five days pursuant to the terms of the decree.

The initial neglect of appellants in failing to attend the sale or take other protective measures was compounded by their failure to file any motion within the period required by Rule 5 (b). The reason underlying the Rule is obvious. Vessels have value only when in use and when lying idle at the dock not only do they produce no income, but dockage fees and expenses for maintenance and protection continue to mount. Accordingly, it is desirable that a judicial sale of a vessel should stand confirmed and the vessel delivered to the purchaser as promptly as possible. In the present case the Shearman had been under attachment and out of operation from April 27, 1971, until June 10th, and the application of Rule 5 (b) to the sale was certainly appropriate.

While we are not insensitive to the plight of appellants and the high priority which the law accords to seamen's wage leins, we do not feel that the circumstances of this case required that the District Judge relax the application of the Rule. Disposition of a motion such as that tendered by the appellants is a matter that falls within the judgment and discretion of the Court which ordered the sale, and the exercise of such discretion should

not be disturbed by an appellate court except in cases of abuse. We find no such abuse in this case. See *American Tramp Ship. & Dev. Corp. v. Coal Export Corp.*, 276 F. 2d 570 (4 Cir. 1960); *American Tarding & Production Corporation v. Connor*, 190 F. 2d 871 (4 Cir. 1940).

The order appealed from will be AFFIRMED.

CRAVEN, Circuit Judge, dissenting:

> Wages of seamen occupy a unique status. The statutory provision extending them the protection of a preferred maritime lien is deeply rooted in history. Seamen's wages, "according to the favorite saying of Lord Stowell and of Mr. Justice Story, are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages." The John G. Stevens, 1898, 170 U.S. 113, 119, 18 S.Ct. 544, 42 L.Ed. 969. The statutes throw around seamen's wages most definite, detailed, and stringent protections from faraway owners of vessels, from shipmasters, and from the seaman himself.

Brandon v. Denton, 302 F. 2d 404, 416 (5th Cir. 1962).

Seamen are wards of the admiralty court and entitled to its protection. I find it incredible that such protection should be forfeited by failure of seamen to dot an "I" or cross a "T" of a local procedural rule.

This is not a case where the concerned parties were unaware of the seamen's wages claimed. Everyone knew of the unpaid wage claims ($7,087.68), including the United States Marshal, whose acceptance of the bid under such circumstances is simply unbelievable. One wonders if a bid of $1 would have been accepted.

Instead of asking that the sale be set aside within two days, as permitted by Local Rule 5, the seamen made such a motion within nine days. Having knowledge of their intervention, it seems to me the court on its own motion would have interposed exception to the sale.

Apparently the district judge refused to even "entertain" the motion to set aside the sale[1] If so, his error was thus one of law: an interpretation of a local rule as preventing the exercise of discretion. The fact that

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THE COURT: All right. The second thing that comes to my mind, Mr. Rutter, and I don't have the local rule in front of me. But if I recall the law, it says that an upset bid on a sale must be made within forty-eight hours. Do you know what rule that is?

MR. RUTTER: Rule 5.

THE COURT: Which is a local rule?

MR. RUTTER: Local Admiralty Rule.

THE COURT: Local Admiralty Rules indicate that an upset bid must be put in within forty-eight hours after the sale took place. This sale took place on June 8, and the question of setting it aside is more than forty-eight hours past. So on that basis I would not entertain your motion to set it aside.

Secondly, for the purposes of appeal, I know the tug SHEARMAN from just casual observation, and while I would not say that, I would not be able to appraise it in ship's language, for the purposes of the record I will assume that the vessel is worth at least twenty-five thousand dollars.

Appendix p. 8.

Western Branch bid in the tug purely to protect its interest in the note to C.I.T., and that no other company could bid against a security interest of $109,000, because the tug wasn't worth that much, is the type of circumstance tending to cause the inadequacy of price which should compel setting the sale aside. "While a judicial sale will not be set aside on grounds of inadequacy of price alone, unless the inadequacy is so great as to shock the conscience of the chancellor, inadequacy of price, accompanied with other circumstances having a tendency to cause such inadequacy, or indicating any apparent unfairness or impropriety, will justify setting aside the sale." *Allen v. Union Transfer Co.*, 152 F. 2d 633, 635 (10th Cir. 7945).

I think seamen as wards of admiralty are due greater consideration on their wage claims than they now receive.

IN THE

Supreme Court of The United States

1972 TERM

No. 71-1449

BRUCE GOLDEN, GUY W. LEWIS, VIRGIL GASKILL, DON LEWIS, STEWART PIGGOTT, THOMAS PIGGOTT, LUTHER P. LEWIS, WILLIAM D. MATTHEWS, ELMER JEFFERSON, STANLEY SHEDAROWICH, CURTIS BECKWITH, WILLIAM GRIFFIN, THOMAS ELLIOTT, CARL CARLSON, GUY RAWLS, WILTON WILLIS, PAUL KEANE, SCOTTY LYNCH, GEORGE GOLDEN, E. T. LAWRENCE, BEN O'NEILL, LINWOOD DALE, RICHARD D. PETERS, STACEY W. BROWN and WALTON DAY,

Petitioners,

versus

Oil Screw FRANK T. SHEARMAN (formerly JOHN T. LILLIS, formerly LINCOLN PARK NO. 1, formerly TIMOTHY J. O'BYRNE), her engines, and tackle, etc., *in rem,*

and

TIDEWATER TOWING COMPANY, INC., *in personam,*

Respondents.

Supreme Court, U. S.
FILED
JUN 7 1972
MICHAEL RODAK, JR., CLERK

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

Page

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE DECISION OF THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA DENYING PETITIONERS MOTION TO SET ASIDE THE MARSHAL'S SALE OF THE TUG *FRANK T. SHEARMAN*.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OF THE SUPREME COURT CASES OFFERED BY PETITIONERS BUT DOES IN FACT CONFORM WITH THE STANDING POLICY OF THE SUPREME COURT CONCERNING JUDICIAL SALES 2

II. THE DECISION BELOW IS NOT IN CONFLICT WITH OTHER DECISIONS OF THE FOURTH CIRCUIT OR WITH DECISIONS OF OTHER CIRCUIT COURTS CONCERNING INADEQUACY OF PRICES AT JUDICIAL SALES OR THE APPLICATION OF RULES LIMITING THE TIME TO FILE EXCEPTIONS 8

III. THE DECISION BELOW IN NO WAY CONTRAVENES THE POLICY PROTECTING THE WAGES OF SEAMEN 11

CONCLUSION 11

CITATIONS

Page

American Tramp Ship. and Dev. Corp. v. *Coal Export Corp.*, 276 F.2d 570 (CA4 - 1960) 9

Ballentyne v. *Smith*, 205 U.S. 285 (1907) 2

Gardner v. *Panama R.R.*, 342 U.S. 29 (1951) 6

Gelfert v. *National City Bank of New York*, 313 U.S. 221 (1941) 6

Ghezzi v. *Foss Launch & Tug Co.*, 321 F.2d 421 (CA9 - 1963) 9

Golden v. *Oil Screw FRANK T. SHEARMAN*, 455 F.2d 133, 135 (CA4 - 1972) 4

Gray v. *Brignardello*, 68 U.S. 627 (1864) 3

Lambert's Point Towboat Co. v. *United States*, 182 F. 388 (CA4 - 1910) 5

Schiavone-Bonomo Corp., v. *Buffalo Barge Towing Corp.*, 134 F.2d 1022 (CA2 - 1943) 10

The Appam, 240 F. 276 (CA4 - 1917) 8

The John G. Stevens, 170 U.S. 113, 119 (1898) 11

The John Twohy, Jr., 189 F. 965 (E.D. Va. - 1911) 5

STATUTORY PROVISIONS

RULE E(9)(b), Supplemental Rules for Certain Admiralty and Maritime Claims 4

LOCAL ADMIRALTY RULE 5(b) of the United States District Court for the Eastern District of Virginia 2, 6

RULE 6(b), FEDERAL RULES OF CIVIL PROCEDURE . 7

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REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OF THE SUPREME COURT CASES OFFERED BY PETITIONERS BUT DOES IN FACT CONFORM WITH THE STANDING POLICY OF THE SUPREME COURT CONCERNING JUDICIAL SALES.

Petitioners urge that *Ballentyne* v. *Smith*, 205 U.S. 285 (1907) sets forth a policy of the Supreme Court on the subject of judicial sales which has been violated in the present case. Because of two important distinguishing factors, *Ballentyne* is not on point. First, there is the fact that the sale in *Ballentyne* was never confirmed. The commissioner who held the sale reported to the First Circuit Court of Hawaii that the sale price was inadequate and recommended against confirmation. The Circuit Court agreed and refused to confirm the sale. On appeal the Supreme Court of Hawaii upheld the refusal to confirm in light of the concurrence of both the commissioner and the Circuit Court that the sale should not be confirmed. This Court agreed with the courts and commissioner below as to the inadequacy of the bid price and affirmed the decision below, saying:

> ". . . and also recognizing that the courts which have passed upon this question are much more familiar with the condition of things in Hawaii, and therefore more competent to appreciate the significance of the transactions attending the sale, we have come to the conclusion that it would not be right to reverse the ruling below and confirm the sale." (At p. 291)

It is a crucial difference that in the *Ballentyne* case the sale was never confirmed whereas in the present case the sale was confirmed and a Marshal's Bill of Sale delivered. The local Admiralty Rule 5(b) for the Eastern District of Virginia

explicitly states that:

> "The Marshal shall file with the Clerk on the day of sale his report thereof, and it shall lie for the two days immediately thereafter for exceptions. If no exceptions are filed, the sale shall stand confirmed as of course."

It is obvious that no sale is final until confirmed, which did not occur in *Ballentyne*. Moreover, title does not pass until the Marshal issues his Bill of Sale to the purchaser. Petitioners had their opportunity to prevent the passage of title. They could have offered to post a supersedeas bond and requested the District Court to stay the delivery of the Marshal's Bill of Sale. Failure to do this compounded their prior neglect in failing to attend the sale and failing to file exceptions within two days after the sale, and allowed title to the vessel to pass irrevocably to Western Branch Diesel. As this Court stated in *Gray* v. *Brignardello*, 68 U.S. 627 (1864):

> "It is a well-settled principle of law that the decree or judgment of a court which has jurisdiction on the person and subject-matter is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication, when made, concludes all the world until satisfied by the proper appellate tribunal. And, although the judgment or decree may be reversed, yet all rights acquired at a judicial sale while the decree or judgment were in full force, and which they authorize, will be protected. It is sufficient for the buyer to know the court had jurisdiction and exercised it, and that the order on the faith of which he purchased, was made and authorized the sale. With the error of the court he has no concern. These principles have so often received the